QUESTIONS PRESENTED

1. Whether the jury's verdict is supported by sufficient evidence.

2. Whether petitioner's acquittal of substantive mail fraud charges requires reversal of his conviction for conspiracy to commit mail fraud.

3. Whether the trial judge's supplemental instruction urging the jury to reach a verdict violated the Sixth Amendment.

4. Whether the trial judge's written responses to questions from the jury after deliberations commenced, made after discussions in chambers which petitioner's counsel, but not petitioner, attended, violated the Sixth Amendment and Rule 43 of the Federal Rules of Criminal Procedure.

STATEMENT

Petitioner, a Pennsylvania Common Pleas Court Judge and former General Counsel of the Pennsylvania Securities Commission, was convicted after a two month jury trial in the United States District Court for Eastern District of Pennsylvania of conspiring, in violation of 18 U.S.C. 371, to use the mails in a scheme to defraud in violation of 18 U.S.C. 1341. He was sentenced to six months' unsupervised probation.

As a result of his conviction, petitioner was suspended from office, pending final resolution of this case, by a divided decision of the Supreme Court of Pennsylvania, Eastern District. *In re Stanley M. Greenberg, Judge, Court of Common Pleas of Philadelphia*, 442 Pa. 447, 280 A.2d 370, 374. The majority noted that it entered the suspension order "with reluctance, but in the clear belief that it is necessary, in order to uphold respect for the

The scheme was a complicated check-kiting arrangement, originated by co-defendant Frank Alper, which utilized at one time or another the private checking accounts of Alper and petitioner and the corporate checking accounts of five companies which Alper controlled. Nine banks were victimized, three of them suffering actual monetary losses totalling more than $250,000. (Tr. 191-198, 829-940, 1248-1250).

Petitioner arranged for the incorporation of the five companies (A. 326a-327a, 341a, 358a-359a, 407a). He was placed on the payroll of each as a director at a salary of $400 a week (A. 359a, 407a, 466a, 467a; Tr. 1021-1024, 1029-1030, 1037-1040;

rule of law and the administration of the judicial process in the courts of this Commonwealth." The dissenting justices noted "the enormous backlog in the First Judicial District", the lack of final adjudication of this case, and the fact that petitioner's conduct occurred prior to his becoming a judge and "involved no judicial misconduct"—would have permitted him to retain office and restricted his services to non-judicial functions.

Alper was tried with petitioner and convicted on the conspiracy count and on twenty substantive counts, and received concurrent sentences of five years' imprisonment on each count. His conviction was also affirmed by the court of appeals. Petitioner was acquitted on the substantive counts, and another defendant—Morton Feiner—was acquitted on all counts. One Maurice R. Hartsock, a bank official, was named as a co-conspirator but was not indicted because of his death.

An accounting analysis of the transactions of two of the companies disclosed that between October 1, 1964 and June 30, 1965, approximately ninety-five percent of receipts and disbursements consisted of checks exchanged among the five companies and receipts from or disbursements to Alper and petitioner (Tr. 2938-2953). ("Tr." refers to the trial transcript; "A" refers to the Appendix in the court of appeals; and "G.X." refers to the government's trial exhibits.)

G.X. 24 A-B).[1] In addition, he had the free use for two years of an automobile which one of the companies leased (A. 409a-410a; G.X. 25-A-E).

Alper's operations were facilitated by petitioner in a number of ways: From September through December, 1963, he exchanged a total of $50,500 in checks with one of Alper's companies, knowing that without his checks there would have been insufficient funds in the company account to cover the checks which it issued and that, except in two instances, without the company checks there would have been insufficient funds in his own account to cover the checks which he issued (A. 155a-172a, 309a-316a, 523a-531a; G.X. 3).

Petitioner also obtained, through the assistance of co-conspirator Hartsock, unsecured loans from two banks at which Hartsock was employed, and transmitted the proceeds to bank accounts maintained either by one of Alper's companies or by Alper personally (A. 12a, 17a, 175a-176a; Tr. 1312-1325; G.X. 22 A-B, C-D, E-F, 36, 57 B-C, 58-B, 60 A, 72 B, 73, 73 D, 112). In obtaining these loans he submitted financial statements which understated his liabilities by over $70,000 in one instance (A. 384a-385a), and by almost $75,000 in the other instance (Tr. 708-710, 2157-2163, 2313-2316, 2322-2325, 2354-2368, 2831-2834; G.X. 35, 36, 37, 38, 41, 41-A, 44, 46, 47). On four occasions he gave assurances concerning Alper and various overdrafts to officers of banks with which Alper's companies had accounts (A. 196a-198a, 249a-

[1] He never actually received compensation, however, from two of the companies (A. 359a, 407a-408a).

251a, 259a 261a; Tr. 251 252). In one instance petitioner guaranteed loans which Alper had obtained for two of his companies (A. 11a, 196a 198a, 200a 201a), the proceeds from which were applied against overdrafts in the accounts maintained by those companies in another bank (A. 199a 201a; Tr. 868 875; G.X. 14 A 13 C D, 15 A 13 C D, 52 A, 53, 54 B, 55 B). Finally, he falsely represented to two officers of one of Alper's companies that he was investing in the company to encourage them to invest (A. 231, 240).

ARGUMENT

1. As the court of appeals held (Pet. App. 20a 21a), the evidence, as detailed above, was clearly sufficient to support the jury's finding that petitioner was a knowing participant in the check kiting scheme. Petitioner's arguments to the contrary (see, *e.g.*, Pet. 18, 20, n. 7) are to the effect that, in light of his political standing and influential friends, he would not have engaged in any such activity, and thus he could not have been guilty. The weight to be attached to the factors relied on by petitioner was a matter for the jury to decide.

2. It has long been established that consistency in jury verdicts is not required, since an inconsistent verdict may reflect no more than the jurors' "assumption of a power which they had no right to exercise, but to which they were disposed through lenity." *Dunn* v. *United States*, 284 U.S. 390, 393. Here, the jury could well have concluded that Alper was the primary malefactor and thus should be convicted on all counts, while petitioner's efforts to facilitate the

scheme merited no more than a conviction on the conspiracy charge. In this regard, the authority of *Dunn* has not been diminished by this Court's later decisions in *Scalfon* v. *United States*, 332 U.S. 575, and *Ashe* v. *Swenson*, 397 U.S. 436. No principles of double jeopardy, *res judicata* or collateral estoppel (see Pet. 28-29) come into play when inconsistent verdicts are arrived at contemporaneously.

3. There is no merit to petitioner's contention that his Sixth Amendment rights were violated by the trial court's supplemental instruction urging the jury to reach a verdict on the charges against him. The instruction given was not, as petitioner infers (Pet. 23-24), the *Allen* charge (see *Allen* v. *United States*, 164 U.S. 492), and contained no suggestion that dissenting jurors should distrust their own judgments because they were in the minority (compare 164 U.S. at 501). In fact, the court below had previously disapproved the *Allen* charge, *United States* v. *Fioravanti*, 412 F. 2d 407, 414-420 (C.A. 3), certiorari denied, *sub nom. Panaccione* v. *United States*, 396 U.S. 837. The basic instruction given here (by the same judge who had presided at the *Fioravanti* trial) was the alternative to *Allen* set forth in Mathes and Devitt, *Federal Jury Practice and Instructions* (1965), Sec. 79.01, and approved by the court below in *Fioravanti* (412 F. 2d at 420 n. 32); the trial judge added a statement instructing that "there is nothing improper, questionable or contrary to good conscience for a jury finally to remain deadlocked" (A. 655a-656a). No court or commentator has ever suggested that non-coercive requests that the jury make one more effort

to reach a verdict—all that really is involved here—should be forbidden."

4. Petitioner's claim of violation of his right to be present at all critical stages of the trial was fully discussed and properly rejected by the court of appeals (Pet. App. 28a-33a). As that court pointed out, the trial judge acted correctly regarding this matter and any possible error committed "was harmless beyond a reasonable doubt" (Pet. App. 33a).

conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Contrary to petitioner's contention (Pet. 23), the verdict slip (Pet. App. 11a) did not evidence either a coerced verdict or one that was less than unanimous. The change on the slip that petitioner notes might just as well have indicated that a clerical error had been made by the person marking the slip and then corrected. The jury was polled following the return to the courtroom and concurred in the verdict (A. 69).